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MEDIA LAW UPDATE

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CONTINUING THE FIGHT TO ACCESS COURT EXHIBITS ACROSS CANADA

Are Canadian Court proceedings really open to public scrutiny? Should the media be able to review, copy and broadcast filed Court exhibits?

The Supreme Court of Canada's answers for 20 years now have been yes and yes. But lower courts continue to pay lip service to these *Charter*-guaranteed rights. This has required media outlets to fight the same battles again and again, most recently winning last week in the Ontario Court of Appeal (*R. v. Canadian Broadcasting Corporation* 2010 ONCA 726), and earlier this year in the British Columbia Court of Appeal (*R. v. Fry* 2010 BCCA 169). The law should now be clear to all that:

1. The press have a right to access filed court exhibits (whether they were played in court or not, in whole or in part), to make copies and to broadcast them, before or after the conclusion of the trial.

2. If any party or the Crown wishes to oppose that access, it must:

   (a) present well-grounded evidence that any limitation is necessary to prevent a serious risk to the proper administration of justice; and

   (b) demonstrate that reasonable alternative measures will not prevent the risk; and

   (c) convince the Court that the benefits of any limitation outweigh the damage to the right to gather and report the news, the right to open courts, "fair and public trial" rights and the efficient administration of justice.

This is called the *Dagenais/Mentuck* test. It was developed by the Supreme Court of Canada in *Dagenais v. CBC* [1994] 3 SCR 835, *R. v. Mentuck* [2001] 3 SCR 442 and *Toronto Star Newspapers Ltd. v. Ontario* [2005] 2 SCR 188, and echoes the strong presumption of public access to Court files that pre-dated the *Charter,* as stated in *A.G. (Nova Scotia) v. MacIntyre* [1982] 1 SCR 175. It has been repeatedly held that the *Dagenais/Mentuck* test is to be applied to all discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings.

ONGOING RELUCTANCE TO PROPERLY APPLY THIS TEST AND GRANT ACCESS

So, why do media outlets have to keep fighting with the Crown, defence counsel, Court registries, and some trial judges to gain access? Why have they had to take media access cases to the Courts of Appeal in British Columbia and Ontario in 2010, and to the Manitoba Court of Appeal in 2006 (*R. v. Hogg* (2006) 208 Man R (2d) 244 (CA))?

Blame the decision of the Supreme Court of Canada in *Vickery v. Nova Scotia Supreme Court (Prothonotary)* [1991] 1 SCR 671. In that decision 20 years ago, the Supreme Court of Canada suggested that privacy interests and rights to a fair trial can automatically trump rights of access to Court files. This approach was made obsolete by the *Charter* analysis given by the Supreme Court of Canada in *Dagenais* in 1994, as has been recognized in an unbroken string of decisions from then until now. And yet *Vickery* lives on in the hearts and the minds of those who do not want the press to have access to Court exhibits, and who continue to raise it in the hope that the

trial judge will agree, or that the costs of fighting will deter the media from pressing the right for people to know what is happening in their Courts, and on what evidence decisions about guilt and innocence are being made. How many applications for access have been abandoned due to a lack of resources to take on and pursue these fights across the country? How much evidence in videotapes, photographs, transcripts, reports and other exhibits has been kept from any public review, scrutiny, analysis or debate?

At last, perhaps, these 2010 Court of Appeal decisions may oblige those who would oppose access to frame their objections using the right test, and to provide the evidence that is constitutionally required to attempt to block or limit access rights.

THE ONTARIO COURT OF APPEAL

In *R. v. Canadian Broadcasting Corporation* (CBC), the unanimous Ontario Court of Appeal confirmed last week that the *Dagenais/Mentuck* test applies to requests by the press to access and obtain copies of court exhibits. The Ontario Court of Appeal expressly rejected that *Vickery* governs such requests.

Ashley Smith, a 19-year-old serving a six year sentence at Grand Valley Institution for Women, managed to kill herself while under observation in an isolation cell. Four correctional officers were charged with criminal negligence causing Ms. Smith's death and the matter proceeded to preliminary inquiry, where numerous exhibits were entered into evidence, including a video of Ms. Smith's death. Ultimately, the Crown determined that there was no reasonable prospect of convicting the accused and decided not to proceed with the charges.

The CBC wanted to produce a documentary about Ms. Smith's life, and applied for an Order releasing all of the trial exhibits. The application judge allowed CBC's application, on the basis of the *Dagenais/Mentuck* test, but limited the Order to only those documents shown in open Court. The application judge also specified that CBC would only be entitled to view, but not copy, the video of Ms. Smith's death, notwithstanding the fact that it was shown in open Court. CBC appealed these limitations and the Crown cross-appealed, asserting that CBC should not have any access to the exhibits pursuant to *Vickery*.

The Ontario Court of Appeal allowed CBC's appeal, holding that it should have full access to any exhibit filed in the proceeding (including the video of Ms. Smith's death), and dismissed the Crown's cross-appeal.

In coming to this conclusion, the Ontario Court of Appeal found that the open court principle and the media's right of access to judicial proceedings extended to anything, including exhibits, that had been made part of the court record regardless of whether presented in open court, absent some countervailing consideration. Further, the Court of Appeal found that, absent evidence of potential harm to a legally protected interest, there was nothing that permitted a judge to impose his or her opinion about what should or should not be broadcast to the general public. Thus, without evidence or legal justification to support the contrary result, even the video of Ms. Smith's "gruesome" demise should properly be made available to the CBC. The privacy interests of an innocent party may still one of the factors to be considered and weighed when applying the *Dagenais/Mentuck* test, but this factor cannot automatically trump the public's right to access.

THE BRITISH COLUMBIA COURT OF APPEAL

In *R. v. Fry,* the British Columbia Court of Appeal in April 2010 confirmed that the *Dagenais/Mentuck* test applies to requests to access and obtain copies of court exhibits. The proper question to be asked when a party objects to such access is whether the evidence presented by that party establishes that "a serious danger would be avoided by declining to provide copies". It held that there is a very powerful public interest in the open debate of police tactics. The salutary effects of denying access, as discussed by the majority in *Vickery,* do not outweigh the very strong presumption to access given by the Supreme Court of Canada in the more recent decisions that have been discussed.

Mr. Fry was convicted by a jury of first degree murder. He confessed to the crime to a "crime boss" who was in fact a police agent. The confession was recorded on videotape and an imperfect transcript was prepared. The videotape and the transcript were marked as exhibits at the trial. The tape was played in open Court, and the transcript was made available to the jury. A publication ban protected the identity of the undercover agents shown on the tape. After

Mr. Fry's conviction, CBC and Global BC applied for access to the exhibits. The trial judge rejected Mr. Fry's assertion that the release of the exhibits could prejudice a potential re-trial (Mr. Fry was appealing the jury verdict). He also rejected the Crown's submission that the release could affect the surviving victim who had been reluctant to testify against Mr Fry. However, the trial judge determined that the tapes would have to be edited to protect the undercover agents and the police methods, and that after editing the release of the tape would not be "conducive to the proper administration of justice". He also felt that since the transcript was incomplete and inaccurate, its release would be "deficient". In the result, he refused access to both exhibits which, arguably, formed part of the key evidence by which the jury had convicted Mr. Fry.

All three appellate judges agreed that the *Dagenais/Mentuck* test applies, and that there must be a sufficient evidentiary basis from which the trial judge may assess the application. The majority of the Court noted that the protection of alleged "operational methods of the police" argument should be given little weight in the "crime boss" scenario, just as the Supreme Court of Canada had given it little weight in *Mentuck.* In fact, the Court of Appeal found that the effect of the ban on access was to prevent the public from being "informed critics of what may be controversial police actions." The Court determined that the suggested editing of the tapes to protect the identity of the informants would achieve the objectives of the trial judge. It rejected the views that the release of the edited tapes or the imperfect transcript could be blocked on the evidence that had been presented, and ordered that the edited tapes be released to the media, along with an edited copy of the transcript.

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